

**ORAL ARGUMENT SCHEDULED FOR MAY 9, 2016**

Nos. 16-1060, 16-1071

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IN THE  
**United States Court of Appeals  
for the District of Columbia Circuit**

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THE VIDEOHOUSE, INC., FIFTH STREET ENTERPRISES, LLC,  
AND WMTM, LLC,  
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
Respondents.

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On Petition for Review of an Order of the  
Federal Communications Commission

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**CONSUMER TECHNOLOGY ASSOCIATION'S AMICUS STATEMENT  
IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONER'S  
EMERGENCY MOTION FOR STAY PENDING APPEAL**

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Dated: March 8, 2016

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**CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the Consumer Technology Association (CTA) certifies the following:

**Parties and Amici.**

a. The Videohouse, Inc., Fifth Street Enterprises, LLC, and WMTM, LLC are the Petitioners. The Federal Communications Commission and the United States of America are the Respondents. LPTV Spectrum Rights Coalition has filed an amicus brief in support of Petitioners' motion. CTA is an amicus party supporting Respondents.

b. Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, CTA respectfully states that it is a trade association for the consumer technology industry with no parent companies and no publicly-held companies with a 10% or greater ownership interest.

**Ruling Under Review.**

The rulings under review are identified in Petitioners' Petition for Review as (i) Report and Order, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd. 6567 (rel. June 2, 2014), 79 Fed. Reg. 48442 (Aug. 15, 2014); (ii) Second Order on Reconsideration, *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions*, GN Docket No.

12-268 (rel. June 19, 2015), 80 Fed. Reg. 46824 (Aug. 6, 2015); (iii) Order on Reconsideration, *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (rel. February 12, 2016), 81 Fed. Reg. 8843 (Feb. 23, 2016); and (iv) all related final orders and rules issued by the FCC in the proceeding captioned *In the Matter of Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268.

**Related Cases.**

In D.C. Cir. Case No. 16-1065, Petitioner Latina Broadcasters, LLC filed an emergency motion requesting that this Court stay the upcoming broadcast television spectrum incentive auction pending resolution of their petition for review. Petitioners in this case have requested the Court to consider their motion for emergency stay with the motion for emergency stay in the Latina Broadcasters matter. CTA has filed a motion seeking leave to submit an amicus statement in the Latina Broadcasters case as well.

/s/ Susan M. Cook  
Susan M. Cook

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**STATEMENT OF INTEREST OF AMICUS CURIAE**

The Consumer Technology Association (CTA) respectfully submits this statement as *amicus curiae*.<sup>1</sup> Counsel for both the Petitioners and the Respondents have consented to the submission of this *amicus* statement. CTA is an industry

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<sup>1</sup> CTA certifies that no party's counsel authored this statement in whole or in part; no party or party's counsel contributed money intended to fund the statement's preparation or submission; and no person other than CTA and its counsel contributed money intended to fund its preparation or submission.

association that engages in legislative and regulatory advocacy, market research, and education. As the leading association for the consumer technology industry, CTA has a unique perspective on the issues presented in Petitioner's Petition for Review generally, and in Petitioner's Emergency Motion for Stay Pending Appeal specifically, that it believes will be of value to the Court. CTA has more than 2,200 members from all segments of the \$287 billion U.S. consumer technology industry, including manufacturers, distributors, technology developers, retailers, dealers, and integrators. CTA's membership spans all participants in the technology industry, including wireless carriers, technology service providers, and device manufacturers.

Many of CTA's members plan to participate in the broadcast television spectrum incentive auction (Incentive Auction) scheduled to begin March 29, 2016. Other CTA members plan to use the additional unlicensed spectrum that will be generated by the Incentive Auction. Because CTA represents companies from all segments of the consumer technology market, it is keenly aware of the effects that a stay of the Incentive Auction would have on members of the industry and the general public.



## SUMMARY OF ARGUMENT

Petitioners seek a stay of the Incentive Auction pending judicial review in this case. The Incentive Auction is scheduled to commence on March 29, 2016. Oral argument in this case has been scheduled for May 9, 2016. Any delay in the Incentive Auction would stifle innovation and have negative consequences for the U.S. economy, which is increasingly dependent on the availability of adequate wireless spectrum to meet the skyrocketing demands of wireless devices. A stay is therefore against the public interest. And even a brief delay in the Incentive Auction would have a catastrophic effect on CTA's members, who have invested millions of dollars in financial, strategic, and practical planning premised on a March 2016 auction. Those investment-backed expectations – many of which include financing arrangements with expiration dates – would be upended if the auction were delayed for even a short amount of time, causing extensive disruptions in the industry. Petitioners' request for a stay of the Incentive Auction therefore should be denied.

## ARGUMENT

### **A STAY OF THE INCENTIVE AUCTION WOULD SEVERELY HARM CTA'S MEMBERS AND THE GENERAL PUBLIC.**

The Incentive Auction, authorized by Congress in 2012, is scheduled to begin in three weeks – on March 29, 2016. Petitioners argue that a stay of the

auction would be in the public interest, but they make no effort to grapple with the very real consequences that a delay would have on the industry and the general public. Pets. Emergency Mot. 20. Petitioners' requested stay of the Incentive Auction would undermine U.S. economic growth and have a disastrous effect on CTA's members, who have made extensive plans for a March 2016 auction.

**A. Delaying the March 29, 2016 Incentive Auction Would Stifle U.S. Economic Growth.**

Any delay in the Incentive Auction will have a detrimental effect on the U.S. economy and technological innovation. Mobile wireless services have transformed the way the country lives, works and communicates. More than 55 percent of children and 46 percent of adults live in households with only wireless telephone service.<sup>2</sup> Smartphones in particular have become an integral part of Americans' daily lives. Recent studies indicate that 64 percent of American adults own a smartphone.<sup>3</sup> A majority of smartphone owners use their phones to follow breaking news events, learn about activities in their communities, and seek

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<sup>2</sup> Stephen J. Blumberg, Ph.D., and Julian V. Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2015* (Dec. 2015), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

<sup>3</sup> Pew Research Center, *Mobile Technology Fact Sheet*, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

emergency help.<sup>4</sup> As a result, licensed wireless spectrum is a critical asset to wireless cell phone carriers and their customers, including commercial users in the health care, transportation, agriculture, and energy industries.

But wireless spectrum is also increasingly important to other technology applications as well. Unlike licensed spectrum, so-called “unlicensed” spectrum is not subject to competitive bidding and instead is readily accessible to any type of device that meets the technical limitations governing operations in the band. Low barriers to entry have allowed unlicensed spectrum to serve as a crucial platform for innovation by technology startups, entrepreneurs and established companies. Devices such as wireless headsets, cordless phones, car door openers, wireless keyboards and printers, baby monitors, smart cameras, thermostats, and “smart” appliances are increasingly dependent on unlicensed wireless spectrum for connectivity and functionality. Wireless carriers and their subscribers are off-loading data transmissions onto unlicensed spectrum using the Wi-Fi functionality of smartphones to relieve congestion over licensed networks and reduce costs. And in the emerging age of the Internet of Things, devices, cars and buildings are now using licensed and unlicensed spectrum to communicate with each other. As a result, there are now more connected devices than there are people living in the

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<sup>4</sup> Pew Research Center, *US Smartphone Use in 2015*, 24-25 (Apr. 1, 2015), [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf).

United States.<sup>5</sup> CTA's economic analysis indicates that unlicensed spectrum generates \$62 billion a year for the U.S. economy. Wireless spectrum use continues to grow at an exponential rate and will continue to expand dramatically for the foreseeable future.

The groundswell in demand for wireless spectrum has created a spectrum shortage that threatens technological innovation and economic growth. To address this crisis, Congress directed the FCC to implement the Incentive Auction. *See* 47 U.S.C. § 1452. By freeing up new licensed and unlicensed wireless spectrum, the Incentive Auction will extract much-needed additional capacity to address the existing scarcity of available spectrum. The benefits will be huge for licensed spectrum, but they will be enormous for unlicensed spectrum.

Delaying the Incentive Auction, even temporarily, will postpone access to the licensed and unlicensed spectrum – stifling economic progress and threatening the country's status as a leader in wireless technology. As FCC officials noted roughly one year ago, “[m]oving forward with the Incentive Auction next year is essential to meet the continuing need for spectrum, especially sub-one gigahertz

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<sup>5</sup> *See* FCC, Broadcast Incentive Auction, <https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions>.

spectrum.”<sup>6</sup> And as an FCC Commissioner has explained, “[a]ny unnecessary or artificial delay [in allocating additional spectrum for commercial use] risks another nation setting the terms of the next 15 years of wireless communications, something we should make sure doesn’t happen.”<sup>7</sup>

Petitioners argue cryptically that the public interest will benefit from a stay because, if this Court ultimately agrees that Petitioners should be deemed eligible for the auction, it will “encourage[e]” payments to broadcasters that participate in the reverse auction and “mak[e] more spectrum available” for mobile broadband use. *Pets. Emergency Mot.* 20. This argument makes little practical sense. The whole point of the Incentive Auction is to allow the FCC to put wireless spectrum to its highest and best use. If Petitioners are deemed eligible to participate in the

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<sup>6</sup> *Next Steps for Spectrum Policy: Hearing Before the Subcomm. on Commc’ns and Tech. of the H. Comm. on Energy and Commerce*, 114th Cong. 4 (2015) (unpublished) (statement of Roger C. Sherman, Chief, Wireless Telecommunications Bureau; Julius P. Knapp, Chief, Office of Engineering and Technology; Gary Epstein, Chair, Incentive Auction Task Force; and John Leibovitz, Deputy Chief, Wireless Telecommunications Bureau and Special Advisor to the Chairman for Spectrum Policy, Federal Communications Commission), <http://docs.house.gov/meetings/IF/IF16/20150326/103253/HHRG-114-IF16-20150326-SD003.pdf>.

<sup>7</sup> *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 114th Cong. 1 (Mar. 2, 2016) (unpublished) (statement of The Hon. Michael O’Rielly, Commissioner, Federal Communications Commission), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0302/DOC-338047A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0302/DOC-338047A1.pdf).

auction, they will either sell their spectrum or hold it. If they sell it, the FCC will have to pay for it, instead of being able to repack it without cost. And if Petitioners choose to hold their spectrum, it will result in less spectrum becoming available through the Incentive Auction. The public interest suffers either way.

Any delay in the Incentive Auction would cripple technological innovation and stifle a significant contributor to the American economy.

**B. CTA's Members Will Suffer Irreparable Harm If The Incentive Auction Does Not Proceed as Planned on March 29, 2016.**

A delay in the Incentive Auction also would irreparably harm CTA's members, who have invested tens of millions of dollars in preparing for a March 2016 auction. Some time ago, the FCC announced an auction date of March 29, 2016. That announcement led the nation's wireless carriers – both large and small – to expend significant resources geared toward competitive bidding for spectrum licenses that were particularly focused on that auction date. “[A]uction participation costs can be substantial – months of senior management time to prepare for and bid in the auction, fees for consultants, regulatory counsel, and other professional services, and the interest payments on upfront payments all contribute to the costs to participate.”<sup>8</sup> Carriers have already raised capital to

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<sup>8</sup> Peter Cramton, Andrzej Skrzypacz & Robert Wilson, *Revenues in the 700 MHz Spectrum Auction 3* (June 27, 2007).

compete in the auction and construct and operate a resulting larger broadband network.

While certain of these expenditures theoretically might be repurposed for use in connection with a later auction date, others – such as financing arrangements – are time-sensitive by their very nature and will be upended by virtually any amount of delay in the auction. Loans and lines of credits come with expiration dates, and such financial plans cannot withstand unexpected delay. This is especially true for the small businesses and rural service providers that already have difficulty raising capital to compete in spectrum auctions. Indeed, the FCC's experience with previous auctions makes clear that a delay in the Incentive Auction could very well mean that some carriers – particularly smaller ones – will not participate in the auction at all.<sup>9</sup>

In short, delaying the Incentive Auction would create immense and long-lasting damage to CTA's members, America's technology industry and the economy as a whole.

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<sup>9</sup> *In re Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Reconsideration of the Commission's Competitive Bidding Rules*, Second Order on Reconsideration, 12 FCC Rcd 15082, 15086 ¶ 5 (1997) (agreeing with petitioners that delaying the auction start date for Local Multipoint Distribution Service licenses could potentially dampen investors' interest in the auction).

## CONCLUSION

For the foregoing reasons, Petitioners' emergency motion for stay pending appeal should be denied.

Respectfully submitted,

/s/ Susan M. Cook

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and is less than half of the 20-page length authorized by the Court's rules for the Respondent's Opposition to Petitioner's Emergency Motion. Fed R. App. P. 29(d) limits an amicus submission to "no more than one-half the maximum length authorized by these rules" for a party's submission.

/s/ Susan M. Cook  
Susan M. Cook

**CERTIFICATE OF SERVICE**

I certify that on March 8, 2016, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Susan M. Cook  
Susan M. Cook